IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1009

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,
Petitioner,

vs.

GUS T. PIANTES and MARY M. PIANTES, his wife,
Respondents.

HAYDEN, STONE INCORPORATED,
a Delaware Corporation,
Petitioner,

vs.

ALEX M. MARKAKIS,
Respondent.

On Petition For a Writ of Certiorari
to the
Supreme Court of the State of Utah

RESPONDENTS' BRIEF IN OPPOSITION

Warren M. Weggeland
692 Kennecott Building
Ten East South Temple
Salt Lake City, Utah 84133

Counsel for Respondents

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OPINIONS BELOW

The opinions below are adequately set forth in Appendices A-E of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Has the scheme of Federal regulation pre-empted state regulation of the securities industry, including regulation of broker-dealers operating within the state and the licensing and supervision thereof?

2. Does the remedy of recission afforded a buyer against a broker-dealer failing to comply with the licensing requirements of a state unreasonably burden interstate commerce or violate the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, Section 2, of the United States Constitution; Section 1 of the Fourteenth Amendment to the Constitution; Sections 61-1-3 and 61-1-22, Utah Code Ann. (1953) are set forth in Appendix F to the Petition. Pertinent portions of Section 18 of the Securities Act of 1933 (15 U.S.C. §77r) and Section 28(a) of the Securities Exchange Act of 1934 (15 U.S.C. §78bb) are set forth in the body of this Brief in Opposition.

STATEMENT

Respondents agree generally with the Statement contained in petitioners' Petition for Writ of Certiorari. However, respondents submit that the following is a more accurate presentation of the material facts of the case.

Petitioner Hayden-Stone, Inc., a Delaware corporation, is a broker-dealer firm engaged in the business of effecting transactions in securities for its own account and for the account of others as part of its regular business activity (App. A, p. 2 of Petition). Petitioner HS Equities, Inc. is the successor of Hayden-Stone, Inc. (App. B, pp. 6, 8 of Petition). Mention herein to petitioner or

petitioners refers to Hayden-Stone, Inc., unless the context indicates otherwise.

During the period January 1, 1969 through December 31, 1969, petitioner Hayden-Stone, Inc. was registered and licensed as a broker-dealer in 41 states, the District of Columbia, and was a member of the New York Stock Exchange, the American Stock Exchange, the Pacific Coast Stock Exchange, the Midwest Stock Exchange, the Boston Stock Exchange, the Cincinnati Stock Exchange, and the Philadelphia - Baltimore - Washington Stock Exchange. During such period it maintained an office at 110 West "C" Street, San Diego, California, and maintained other offices throughout the nation. Also during such period, petitioner was not licensed and registered as a broker-dealer by the Utah Department of Business Regulation nor was it qualified to do business within the State of Utah as a foreign corporation (App. A, pp. 1, 2 of Petition).

The San Diego office of petitioner employed as agents, employees and registered representatives Phillip Jay and Donald Foley (R. 24, 25).

The petitioner maintained at its San Diego office trading accounts for several Utah residents, including respondents, through which buy and sell transactions occurred in securities listed on the New York Stock Exchange or other registered exchanges and in unlisted securities (R. 25). Of these accounts, the accounts of respondent Markakis and the witness Joe Santi appeared to have been opened in November 1967 (R. 65, 103); the account of Vic Santi opened October 31, 1968 (R. 126); the account of Mike Dmitrich opened September 25, 1969 (R. 131); and the account of the respondents Piantes opened approximately September 4, 1969 (R. 137).

On October 27, 1969, respondent Markakis purchased from petitioner, acting as agent, 1,000 shares of Occidental Petroleum Corp. preferred stock at a cost of $43,656.30; on October 28, 1969, Markakis purchased from petitioner, acting as principal, 1,000 shares of King Resources Company common stock at a cost of $28,875; on December 18, 1969, Markakis purchased from petitioner, acting as agent, 1,000 shares of Royal Inns of America common stock at a cost of $28,330 (App. A, p. 2 of Petition; Def's. Ex. 5). On November 3, 1969, respondents Piantes sold through petitioner 150 shares of Royal Inns of America common stock, and on November 19, 1969 purchased 200 shares of Blue Chip Stamps common stock (R. 136; Plf's. Ex. B) from petitioner, acting as principal, for a net purchase price of $4,300.

Numerous telephone and personal solicitations were made by representatives of petitioner to solicit purchase and sales transactions of various securities, which solicitations were directed to respondents and other residents of Utah (App. E, p. 20 of Petition).

On May 5, 1970, respondents Piantes wrote to petitioner demanding recission of the transaction whereby they purchased shares of Blue Chip Stamps and requested a return of the $4,300 paid as consideration therefor (Plf's. Ex. C). The offer was not accepted by petitioner (R. T. 143). Mr. Foley then contacted respondents Piantes and asked them to reconsider (R. T. 144). Being unsuccessful in their attempt to recover the consideration paid for the Blue Chip Stamps common stock, and upon advice from their banker, attorney, and upon reading a newspaper article that petitioner was having financial problems, respondents Piantes demanded good delivery to them of the Blue Chip Stamp certificates, and the balance of their account at Hayden-Stone, Inc. (R. T. 142, 151; Def's. Ex. 7). On October 5, 1970, they again of-

fered to rescind the transaction and tendered to petitioner the certificates representing their shares of Blue Chip Stamps common stock (Plf's. Ex. D).

On May 27, 1970, respondent Markakis tendered to petitioner the stock of Occidental Petroleum, King Resources and Royal Inns of America owned by him, and demanded return of the consideration paid therefor (Def's. Ex. 6).

Being unsuccessful in all such attempts, respondents initiated actions against petitioners to recover the purchase price of the securities under remedies afforded by Section 22(1) of the Utah Uniform Securities Act.

After respondents learned that petitioner was not licensed as a broker-dealer in the State of Utah, they conducted no further business with petitioners. At no time were respondents officers, directors, agents or employees of petitioners (App. A, p. 3; App. B, p. 8 of Petition).

Based on the evidence at trial, the Seventh Judicial District Court of Carbon County, Utah found that petitioner had directed at least 86 solicitations of offers to buy or sell securities into the State of Utah to persons residing in and present in Utah, which persons were not institutional buyers or otherwise exempt persons (App. A, p. 3; App. B, pp. 8-9 of Petition), and granted judgments in favor of respondents against petitioners for the amount paid by respondents as consideration for the securities involved, together with interest from the date of payment, costs and attorney's fees (App. C, p. 15; App. D, p. 17 of Petition).

On September 27, 1973, the Supreme Court of Utah, in a unanimous opinion written by Justice Ellett, affirmed the judgment of the trial court. 30 Utah 2d ...., 514 P. 2d 529 (1973).

REASONS FOR DENYING WRIT

The respondents oppose the Petition for Writ of Certiorari on four grounds:

I.

The Untimely Filing of the Petition Deprives This Court of Jurisdiction Over the Case.

The Petition for Writ of Certiorari is plainly out-of-time. The judgment of the Supreme Court of the State of Utah was entered and filed September 27, 1973, simultaneous with its opinion. No rehearing was sought or denied.

Pursuant to the provisions of 28 U.S.C. §2101(c), the Petition for Writ of Certiorari must be applied for "within ninety days after the entry of such judgment or decree" — in other words, no later than December 26, 1973. Although petitioner filed an Application for Extension of Time Within Which to File Petition for Writ of Certiorari, on or about January 16, 1974, such Application was denied by Mr. Justice White on January 17, 1974. Thus, no extension of the filing deadline was obtained from a justice of this Court.

The Petition was actually filed on December 27, 1973, after the expiration of the December 26 deadline. Where, as here, the time for filing a petition is established by an Act of Congress, rather than a rule of this Court. such an untimely filing has consistently been held to be a jurisdictional defect, making it impossible for the Court to waive the untimeliness or to entertain the Petition. As stated in *Dep't. of Banking v. Pink,* 317 U. S. 264, 268, 87 L. Ed. 254, 63 S. Ct. 233 (1942), such a petition "must . . . be denied for lack of jurisdiction." See also *Teague v. Comm'r. of Customs,* 394 U. S. 977, 22 L. Ed. 2d 756,

89 S. Ct. 1457 (1969), *rehearing denied,* 395 U. S. 930, 23 L. Ed. 2d 251, 89 S. Ct. 1768 (1969), where a Petition for Writ of Certiorari was denied when it arrived two days late for filing because of a severe snow storm which had interrupted the mails. In *Schacht v. United States,* 398 U.S. 58, 63-65, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970), the Court emphasized that a waiver of untimeliness can be made only where a rule of this Court, rather than a statute, establishes the time requirement.

II.

Petitioner Failed to Raise the Federal Question in the Courts Below.

As a general rule, the Supreme Court will refuse to consider an argument not raised below. Rule 23(1)(f) of the Supreme Court Rules requires disclosure of the method and manner by which federal questions sought to be reviewed were raised in the first instance in the courts below, and the way in which they were passed upon by such courts. Such requirement is imposed to " . . . show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Petitioner has admitted in its Petition that federal questions were not raised below (Petition, p. 7).

Under the statute controlling the Supreme Court's power to review final judgments of state courts (28 U.S.C. §1257(3)), the Supreme Court lacks jurisdiction to determine the constitutionality of a state statute where the sole federal question has never been raised, preserved or passed upon by the state court below, and the Supreme Court will not decide federal constitutional issues raised for the first time on review of state court decisions. *Cardinale v. Louisiana,* 394 U. S. 437, 439, 22 L. Ed. 2d 398, 401, 89

S. Ct. 1162 (1969); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assoc.,* 360 U. S. 334, 342, 3 L. Ed. 2d 1280, 1286, 79 S. Ct. 1196 (1959); *State Farm Mutual Automobile Insurance Co. vs. Duel,* 324 U. S. 154, 157-163, 89 L. Ed. 812, 817-819, 65 S. Ct. 753 (1945). See also *Monks v. New Jersey,* 398 U. S. 71, 26 L. Ed. 2d 54, 90 S. Ct. 1563 (1970).

III.

There Exists No Federal Question.

The decision of the Utah Supreme Court was based on adequate, independent, non-federal grounds. The Utah Supreme Court held that petitioner was subject to the licensing and registration requirements of the Utah Uniform Securities Act, that its transactions with Utah residents were not exempt from the Act and that respondents were entitled to rescind those transactions whereby they purchased securities from or through petitioner. The court considered the question of jurisdiction by the Utah courts over the petitioner and the voidability of the transactions of respondents. Its holding that the Utah courts had jurisdiction over petitioner to make the judgments rendered, and that transactions by purchasers with unregistered brokers are voidable at the election of purchasers were based on the provisions of the so-called Utah "long-arm statute" (§78-27-22, U.C.A. 1953), the substituted service provision of the Utah Uniform Securities Act (§61-1-26(7), U.C.A. 1953), and an interpretation of the remedies afforded by the provisions of Section 22 of the Utah Uniform Securities Act (§61-1-22(1) U.C.A. 1953). (App. E, p. 19 of Petition). The decision of the Utah Supreme Court is clearly correct.

The federal questions asserted by petitioner are either insubstantial or not actually presented by the record. It is essential for Supreme Court jurisdiction under 28 U.S.C.

§1257(3) to review a state court decision that it be shown that a state court actually decided a federal question. This petitioner has failed to do. As such, this Court lacks jurisdiction to review the decision of the Utah Supreme Court. *Herb v. Pitcairn,* 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459 (1945); *Black v. Cutter Laboratories,* 351 U.S. 292, 100 L. Ed. 1188, 76 S. Ct. 824 (1956); *Johnson v. Thornburg,* 276 U.S. 601, 72 L. Ed. 725, 48 S. Ct. 322 (1928); *Wilson v. Loew's, Inc.,* 355 U.S. 597, 2 L. Ed. 2d 519, 78 S. Ct. 526 (1958).

By unlawfully transacting business in the State of Utah while not properly licensed as a broker-dealer by the Utah Department of Business Regulation, petitioner subjected itself to the remedies provided by Section 22 of th Utah Uniform Securities Act, which are intended to compel broker-dealer compliance with the registration and licensing requirement. Absent compliance, petitioner must assume the consequences of its negligent or intentional acts. Although petitioners claim that the remedies afforded by Section 22 are excessive and thwart federal policy (Petition, p. 22), there appears no Congressional pronouncement to substantiate such claim, and the amount of recovery afforded a purchaser pursuing a claim under Section 22 depends on the dollar amount of the unlawful transactions. Petitioners merely seek to avoid their statutory liability, but that does not convert a correct decision by the Utah Supreme Court in a simple case to an important question of federal law or constitutional issues.

IV.

There is No Federal Pre-emption of State Regulation of the Securities Industry.

When Congress adopted the Securities Act of 1933 (15 U.S.C. §77a, *et seq.*), and the Securities Exchange

Act of 1934 (15 U.S.C. §78a, *et seq.*), 47 states had "blue sky" laws at that time. *Crosby v. Weill,* 382 Ill. 538, 48 N.E. 2d 386 (1943). That Congress did not intend to supercede state regulation of the securities industry is evidenced from its specific pronouncement in Section 18 of the 1933 Act (15 U.S.C. §77r) that:

> Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

Section 28(a) of the 1934 Act (15 U.S.C. §78bb) states:

> The rights and remedies provided by this title shall be in additon to any and all other rights and remedies that may exist at law or in equity; . . . Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

Similar provisions are set forth in Section 21 of the Public Utility Holding Company Act of 1935 (15 U.S.C. §79u), Section 326 of the Trust Indenture Act of 1939 (15 U.S.C. §77zzz), Section 50 of the Investment Company Act of 1940 (15 U.S.C. §80a-49) and Section 222 of the Investment Advisers Act of 1940 (15 U.S.C. §80b-18a).

Every state having adopted any form of securities regulation legislation requires registration and licensing of broker-dealers. Such registration is intended to prevent fraudulent or unquailfied persons from entering the securities business, to supervise their activities within the state once registration has been achieved, and to remove

them from registration if they fall below any of the statutory standards. 1 Loss, *Securities Regulation* (2d Ed. 1961, Supp. 1969) 34, 43.

Since 1919, Utah has had a statutory scheme of regulation of the securities industry. In 1963, Utah adopted the current Utah Uniform Securities Act. That state regulation of the securities industry is a proper function of the police power of the states has long been recognized as not imposing an undue burden on interstate commerce or violative of the Fourteenth Amendment. See *Hall v. Geiger-Jones Co.*, 242 U.S. 359, 61 L. Ed. 480, 37 S. Ct. 217 (1917); *Caldwell v. Sioux Falls Stockyards Co.*, 242 U.S. 559, 61 L. Ed. 493, 37 S. Ct. 224 (1917); *Merrick v. N. W. Halsey & Co.*, 242 U.S. 568, 61 L. Ed. 498, 37 S. Ct. 227 (1917); *Travelers Health Assoc. v. Commonwealth of Virginia, ex rel. State Corp. Comm'n.*, 339 U.S. 643, 94 L. Ed. 1154, 70 S. Ct. 927 (1950).

In *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, ... U.S. ....., 38 L. Ed. 2d 348, 366, 94 S. Ct. ..... (1973), this Court quoted Mr. Justice Brennan from the opinion in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 10 L. Ed. 2d 248, 257, 83 S. Ct. 1210 (1963) relative to the issue of federal pre-emption:

> Federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

There exist no persuasive reasons for concluding that the national government has pre-empted state regulation of the securities industry, or specifically, the registration and licensing of broker-dealers, nor has Congress so ordained. Contrarily, Congress has specifically stated that

federal regulation shall be concurrent with state regulation, a doctrine recently acknowledged by this Court in the *Ware* case in which Mr. Justice Blackmun stated at 38 L. Ed. 2d 364, 365:

> Indeed, Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation.

State regulation of the securities industry within a state encompassing registration and licensing of broker-dealers, and providing remedies to purchasers for non-compliance by a broker-dealer, in no way offends or conflicts with federal regulation of the securities industry or broker-dealers.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Warren M. Weggeland
692 Kennecott Building
Ten East South Temple
Salt Lake City, Utah 84133

Counsel for Respondents

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